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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PAT BROWN, JR.,
Petitioner,

versus

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF LOUISIANA STATE POLICE,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Louisiana

PETITION FOR CERTIORARI

CAROLYN PRATT PERRY
Attorney of Record
FRANKLIN, MOORE & WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

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QUESTIONS PRESENTED

1. Whether a Louisiana statute which authorizes police to summarily confiscate and without notice and hearing to destroy a single antique one-cent slot machine which did not have a locked coin box, and, which, as stipulated by the State, was not and could not be used for gambling purposes violates the owner's constitutional right of due process.

2. Whether a Louisiana statute which includes "any slot machine" within its definition of gambling devices subject to immediate confiscation and destruction, regardless of the fact that most slot machines are devoid of any gambling purpose, and a slot machine by definition is any machine whose operation is begun by dropping a coin into a slot, is unconstitutionally vague and overbroad since it would authorize the confiscation and immediate destruction of all coin operated machines, including a penny gum machine as well as a thirty-five cent Coke machine.

3. Where the affidavit offered to support the issuance of a search warrant on its face was based upon hearsay evidence since this affidavit, (a) failed to identify for certain who was actually the person who observed the antique slot machine, and, thus, did not affirmatively establish the reliability of the informant; (b) only set forth a conclusion that the slot machine was in a certain location, without any facts stated to support this conclusion; and (c) offered no facts to indicate that any crime was being committed, was a search warrant properly issued on the basis of this affidavit.

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

PAT BROWN, JR.,
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STATE OF LOUISIANA THROUGH
THE DEPARTMENT OF PUBLIC
SAFETY, DIVISION OF
LOUISIANA STATE POLICE,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Louisiana

PETITION FOR CERTIORARI

The petitioner, Pat Brown, Jr., plaintiff below, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana, which reversed the decision of the Court of Appeal of Louisiana, First Circuit. In affirming the judgment of the trial court the First Circuit Court of

Appeal had declared portions of Louisiana Revised Statute 15:31 unconstitutional. The Louisiana Supreme Court decision should be reversed and La. R.S. 15:31 should be found unconstitutional as applied to the facts of this case.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana, reported at 392 So.2d 415 (La. 1980), appears as Appendix "A" to this petition. Appendix "B" contains the opinion of the Court of Appeal for the First Circuit of Louisiana, reported at 385 So.2d 436 (La. App. 1st Cir. 1980). The district court's decision and written reasons for judgment appear as Appendix "C" to this petition. The Notice of Appeal to the Louisiana Supreme Court that its decision herein was based on a federal question and that its decision upheld a Louisiana statute against federal constitutional attack comprises Appendix "E" to this petition.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on December 15, 1980. A timely motion for rehearing was denied by that court on January 26, 1981, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction rests on 28 U.S.C. 1257(2) and/or 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

La. R.S. 14:90 Gambling. See Appendix "H" for verbatim text at pp. 43a-44a.

II.

La. R.S. 15:31 Confiscation and destruction of gambling devices. See Appendix "H" for verbatim text at pp. 44a-46a.

III.

U.S. Constitution, 4th Amendment. See Appendix "H" for verbatim text at p. 46a.

IV.

U.S. Constitution, 5th Amendment. See Appendix "H" for verbatim text at pp. 46a-47a.

V.

U.S. Constitution, 14th Amendment, Sections 1-5. See Appendix "H" for verbatim text at pp. 47a-48a.

STATEMENT OF THE CASE

This appeal puts at issue the constitutionality of Louisiana Revised Statute 15:31 as it relates to the summary seizure and destruction of an individual's personal property — a collector's item, a single antique one-cent slot machine.

Pat Brown, like many other antique buffs and hobbiests throughout the United States, had purchased an antique penny slot machine as a novelty item. (See Examples of Advertisements Re: Antique Slot Machines taken from National Publications: "The Coin Slot" and "Loose Change" in Appendix "G") It is legal to collect antique slot machines in twenty-six states.[1]

On July 17, 1979, the State of Louisiana, through the Department of Public Safety, Division of State Police, under the authority of LSA-R.S. 15:31[2] entered the pri-

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1 Washington, Oregon, California, Nevada, Utah, Colorado, South Dakota, Nebraska, Kansas, Texas, Minnesota, Indiana, Missouri, Mississippi, Wisconsin, Illinois, Michigan, Ohio, Vermont, Pennsylvania, Massachusetts, Connecticut, New Jersey, Virginia, North Carolina, Florida.

2 La. R.S. 15:31. A. All law enforcement officers of municipal police forces, sheriffs' departments, and the division of State Police are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all gambling devices or machines used for gambling that come to their attention. B. As used in this section, the term "gambling device" means: (1) any slot machine; or (2) any machine, mechanical or electronic device of any sort whatsoever with a cash

vate restroom for women employees at Pat Brown's Claim Service and seized an antique one-cent slot machine, being temporarily stored in the restroom. The slot machine is the personal property of Pat S. Brown, Jr., the petitioner herein.

Brown filed suit for injunctive relief to prevent the immediate destruction of the antique slot machine as well as for its return. The case was tried on a written stipulation of facts (Appendix "D"), which set forth the following: A single slot machine was seized from the women's restroom of Pat Brown's Claims Service; the one-cent antique slot machine was the *personal property* of Pat Brown, Jr.; the coin box on the machine did not have a lock so that coins once deposited could be reclaimed by the depositor; although it was operable by insertion of a penny and *not* by insertion of coins of greater monetary value, the slot machine was *not used for gambling purposes* (see stipulation by State, Exhibit D). No criminal charges were ever brought against Brown arising out of his possession of the slot machine.

When seizing Pat Brown's antique slot machine, the State Police relied on a search warrant which stated the following basis for its issuance:

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automatic payout device; or (3) a pinball machine or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or replays so released.

> "The affiant, having been advised by Detective Betty Smothers of the Baton Rouge City Police Department, that the slot machine *(one arm bandit)* was at the above location at 12:30 P.M. on 7/17/79. The machine is located in the public bathroom for women at Pat Brown's Claim Service." (emphasis added)

(See Written Stipulation of Facts with attached Search Warrant, Appendix "D").

The trial court granted the relief sought by Brown, ordering that the slot machine be returned to him. The State appealed that decision to the Louisiana First Circuit Court of Appeal which affirmed the trial court's decision and declared La. R.S. 15:31 unconstitutional on both state and federal grounds, in that this statute allowed the confiscation and immediate destruction of personal property without any judicial proceedings. The Louisiana S_preme Court reversed, on the basis that Pat Brown's collector's item, a single antique one-cent slot machine, admittedly not used for any gambling purpose, was inherently detrimental to the community and thus properly the subject of summary destruction. The dissenting Justices Watson and Lemmon reasoned that since the antique slot machine operated with pennies by *stipulation* was not used for gambling purposes, the prohibition set out in La. R.S. 15:31 could not constitutionally apply to this case. From this decision, Pat Brown, Jr. has filed this petition for writ of certiorari to the Supreme Court of Louisiana.

REASONS FOR GRANTING THE WRIT

I.

La. R.S. 15:31 Violates Pat Brown's Constitutional Rights To Property And Due Process Of Law Because It Authorizes The Louisiana State Police To Summarily Confiscate And Destroy Without Notice Or Hearing Pat Brown's Personal Property.

Pursuant to La. R.S. 15:31 any device characterized by a law enforcement officer as a slot machine is subject to seizure and destruction without any judicial intervention and without notice or opportunity for a hearing. The statute does not require the confiscation be in conjunction with an arrest and/or conviction of the crime of gambling. No substantive law in Louisiana prohibits the ownership, possession of a slot machine not used for gambling purposes. It is *only* when a slot machine is used to commit the crime of gambling that there is any reprobated activity under La. R.S. 14:90(A)[3] which defines the crime of gambling.

It has long been recognized that a state through the exercise of its police power can constitutionally act to summarily confiscate and destroy things which cannot

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3 La. R.S. 14:90(A) in pertinent part defines the crime of gambling as follows: "Gambling is the intentional conducting, or directly assisting in the conducting, *as a business*, of any game, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit." (emphasis added)

be put to a lawful use. However, if the thing seized is susceptible of a legal use, due process requires notice and opportunity for a hearing.

It does not require a great deal of imagination to realize that an antique one-cent slot machine is fit and may be used for innocent and harmless entertainment and as a novelty item, furniture, a conversation piece, as well as for other lawful and beneficial purposes. An antique one-cent slot machine is not solely limited in use in connection with unlawful gambling any more than is a deck of cards, or the electronic games, which are the current rage. An antique one-cent slot machine could quite readily, as it had been in the case presently before the Court, be placed in a den or game room with a jar of pennies next to it, so that anyone passing by could pause for a few moments amusement without any risk of loss.

There is no doubt that an antique one-cent slot machine like the one in this case may have value and be susceptible of lawful use for purposes other than gambling. *In Re Certain Gambling Paraphernalia*, 47 N.M. 132, 138 P.2d 267 (N. Mex. 1942); *State v. Derry*, 85 N.E. 765 (Ind. 1908). The aesthetic interest and the significant role in the history of the state of antique slot machines have recently been recognized by the California Legislature in passing a statute specifically protecting antique slot machines. *California Penal Code, Section 330.7.*

Furthermore, the Louisiana Legislature realizes the historic and aesthetic value of antique slot machines not being used for gambling purposes. As the Louisiana Supreme Court noted in footnote 5 of its opinion in this case (Appendix "A"), Senate Bill 470 of 1980 (Appendix "F") removed antique gaming machines (those constructed prior to October 1, 1950) from classification as a gambling device. This bill expressly authorized the ownership and possession of such machines, unless they were used for unlawful gambling. Even if such antique machines were purportedly being used for gambling, the proposed bill required that they not be destroyed until there was judgment of a court declaring that they were indeed used for unlawful gambling. Senate Bill 470 passed both houses of the Louisiana Legislature unanimously, but was vetoed by the Governor after the close of the 1980 legislative session.

Despite the action on this bill, the Louisiana Supreme Court reached the questionable conclusion that the Louisiana Legislature believed that all slot machines, even one-cent antique machines not intended for use in gambling, were inherently detrimental to the community. (Appendix "A", p. 10a) In light of the above cited cases and authorities, the better opinion on what the Louisiana Legislature intended to include within the scope of La. R.S. 15:31 (B)(1) is that set forth in Justice Lemmon's dissenting opinion. Justice Lemmon noted that since Pat Brown's antique one-cent slot machine could not in fact be used for gambling purposes (its coin box did not have a lock), it "could not

reasonably be classified as either a gambling device or an instrumentality which is so dangerous to the safety or health of the community that its summary destruction is warranted." (Appendix "A", p. 13a)

Furthermore, as the following authorities indicate, since it was stipulated that the machine in this case was not used for gambling purposes, it cannot constitutionally be subjected to summary seizure and destruction pursuant to La. R.S. 15:31.

It is uncontroverted that the State under its police power has the right to declare the possession of things to be illegal contraband if these things are obnoxious to the public health or safety or to the public morals. However, as mentioned above, no Louisiana statute specifically declares an antique slot machine to be contraband. It simply is not a crime to own or possess a slot machine in Louisiana. Thus to authorize summary seizure and destruction of private property which is legally possessed violates the federal constitutional provision of due process.

Insofar as the police power is utilized by the State, the means employed to effect its exercise can be neither arbitrary nor oppressive but must bear a real and substantial relation to an end which is public — the public welfare. Police authorities cannot in the absence of a statute making possession of gambling devices an offense, summarily seize and retain possession of such devices as a matter of preventive justice, where no

charge of violation of the laws against gambling has been made against the one having them in possession. *Soper v. Michal,* 123 Md. 542, 91 A. 684 (Ct. of Appeals Md., 1914).

Under La. R.S. 15:31, the officer making the seizure has blanket, unrestricted authority to determine the applicability of the statute to the machine seized. Nowhere does the statute provide for an evidentiary hearing, nor does it allow any appeal from the non-judicial determination by the officer making the seizure as to the applicability of the statute to the machine seized.

Additionally, under the statute, the seizing officer is directed to immediately destroy any such device seized. The destruction can occur prior to a judicial determination whether the search warrant was properly issued.

The statute, therefore, makes the seizing officer the judge, jury and executioner, with no legal remedy or hearing allowed to the petitioner to question the propriety of the seizure, or the statute's applicability.

Several cases indicate that La. R.S. 15:31, insofar as it provided for the summary seizure and destruction of Pat Brown's antique one-cent slot machine in the stipulated circumstances of this case, violated Brown's 14th Amendment right to due process of law.

In the case of *Lowry v. Rainwater*, 70 Mo. 152 (Mo. 1879), it was said that any statute authorizing an officer, "without notice to the owner, or even a semblance of judicial investigation, to seize and destroy the property of a citizen" violated constitutional guarantees of due process; that a legislative act which, under the pretext of preserving public morals, provides for the seizure of private property, should also provide a summary mode of judicial proceedings for determining whether it is the kind of property, and was used or held for purposes, condemned by the act; and that the constitutional safeguards thrown around rights of property "are not to be demolished in order to suppress gambling or gambling houses." We recognize, the court said, the right of the state to adopt, and the propriety of a rigorous enforcement of, laws for the suppression of gambling, but such laws can be so framed as to harmonize with due process requirements, "and hasty and inconsiderate legislation which disregards them cannot be upheld."

La. R.S. 15:31 makes no such attempt to harmonize due process considerations with its effort to suppress gambling. This statute did not provide even a summary mode of judicial proceeding to determine whether Pat Brown's antique one-cent slot machine had any reprobated purpose. (In fact, this antique was stipulated not to be susceptible of gambling usage since its coin box could not be locked.)

On the same point, the court in *Prendergast v. Dwyer*, 88 Idaho 278, 398 P.2d 637 (Idaho 1965), found that since the state statute made no provision for notice and an opportunity to be heard, and since judicial determination was required of the issue of whether the seized devices were or were not within the operation of the statute, it followed that the statute denied the owner of the device in question due process of law.

The reasoning of these cases was further explained in *State v. Robbins*, 124 Ind. 308, 24 N.E. 978 (Ind. 1890). The court stated that it is fundamental that no person can be deprived of an article which is recognized by the law as property, without a judicial hearing after due notice; that there are some articles which cannot be kept or used for any lawful or innocent purpose, and these are regarded as nuisances per se, property cannot exist in them, and an officer into whose hands they come may be authorized by statute to destroy them summarily without process; that there are other articles which are not nuisances of themselves, but which may be used for illegal purposes, but may yet be regarded as constituting property; that gambling apparatus is within the latter classification; that it may be a question whether implements or articles seized in a particular case are "honest, lawful tools or things for innocent amusement" or, on the other hand, constitute gambling devices; that gaming apparatus may be made of valuable material, capable in some other form of being applied to useful and lawful purposes, or may be used for innocent and harmless amusement in the

form in which it exists; that it cannot always be determined by inspection, or disclosed as a matter of law, that articles used for the illegal purpose of gaming may not also be used for innocent and lawful purposes; that, accordingly, unless articles seized are of such a character that the law will not recognize them as property entitled, as such to its protection, they cannot be summarily destroyed without affording the owner an opportunity to be heard upon the subject of their lawful use, and to show whether or not the articles are intrinsically useful or valuable for any other purpose than gambling, or whether their only recognized value and customary use is as implements of gaming; and that, under the statutes in question, if upon inquiry by the court trying the person accused of gaming it should appear that the property seized is of no substantial use or value except in connection with a gambling room, or if the use to which it is customarily devoted by the owner is unlawful gambling, its destruction should be ordered, but as to all other property seized, that is, such property as is adapted to a lawful use, it should be ordered returned to the owner.

These propositions were reiterated in the case of *State v. Derry*, 171 Ind. 18, 85 N.E. 765 (Ind. 1908). The court pointed out that the articles seized in the *Derry* case, described as "slot machines, variously named tables, and chips", were, indeed, suitable for unlawful gaming, but were also, according to the testimony of the state's witness, fit, and usable, for innocent and harmless amusement or as household furniture. None of the articles,

the court continued, was innately vicious, and since they were capable of two uses, neither ministerial officers nor courts could "upon mere view deprive them of their characteristics as property and put them under legal condemnation." Such a proceeding, the court said, would be clearly unconstitutional.

In this case, Pat Brown's antique one-cent slot machine was stipulated *not* to be susceptible of gambling usage, since it did not have a locked coin box. It was only a source of innocent and harmless amusement. This antique also had historical and aesthetic value. In these circumstances, since La. R.S. 15:31 authorized the summary seizure and destruction of Brown's property without affording Brown an opportunity to be heard on the subject of its lawful use and its other intrinsic values, La. R.S. 15:31 must be held unconstitutional as a violation of Brown's right to due process protection of his property under the 14th Amendment.

The Louisiana Supreme Court cited certain cases as purported authority for the constitutionality of La. R.S. 15:31 as applied in this case. A closer examination of the cited cases will reveal that in each instance where the courts upheld statutes authorizing the summary seizure and destruction of property, those statutes restricted the use of such summary procedures to situations involving derivative contraband. In other words, these cited cases only stand for the validity of statutes

authorizing the summary disposal of items which had been put to some illegal use or had been the means of committing a criminal offense. Thus, the cases cited are not authority for constitutionally upholding La. R.S. 15:31 as it was applied under the facts of this case, since the antique slot machine was not derivative contraband as it was not used for gambling purposes while in Pat S. Brown, Jr.s possession and no charges have been brought against Pat S. Brown, Jr.

In the case of *State of Louisiana v. Ricks*, 41 So.2d 232 (La. 1949), the Court upheld the summary seizure and destruction of certain slot machines pursuant to the provisions of Act 231 of 1928. In addition to upholding this application of Act 231, the court upheld the criminal convictions of the owners of the seized slot machines, who had been "charged, tried and found guilty of the crime of gambling" under Article 90 of the Criminal Code. The *Ricks* court was satisfied that the convicted gamblers had used the slot machines in their criminal gambling activities. Only on these facts did the *Ricks* court uphold the constitutionality of Act 231 of 1928. The case before this court involves an entirely different situation in that the State stipulated that this antique one-cent slot machine was not being used for gambling purposes.

The Louisiana Supreme Court also cited the case of *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385, quoted extensively in the *Ricks* opinion, as additional authority for the valid application of La. R.S. 15:31.

This *Lawton* case involved the constitutional validity of a New York statute which prohibited the taking of fish from certain waters within the state and authorized the summary seizure and destruction of any nets or any means or devices for taking and capturing fish in violation of the provision of the statute. Pursuant to this statute, a number of nets which had been used in statutorily proscribed fishing operations were summarily seized and destroyed. On these facts, the United States Supreme Court upheld the constitutionality of the statute, saying that New York could constitutionally seize and destroy those nets which had been "put to an illegal use" or had been the "means of the offense". Pat S. Brown's antique slot machine had not been put to any "illegal use" and had not been the "means of" any offense.

The State has cited the case of *J. B. Mullen & Co. v. Mosley*, 90 P. 986 (S.Ct. of Idaho, 1907) as additional "authority" for the constitutional application of La. R.S. 15:31. However, just as in *Ricks* and *Lawton*, the cited case only dealt with items constituting derivative contraband — items put to an "illegal use" and/or items which had been the "means of" an offense.

The State also relied on *In Re Destruction of One Gambling Device*, 559 P.2d 1003 (Wash.App. 1977) as a "deciding" case in that a confiscatory statute was upheld even when applied to an inoperable slot machine. However, the Washington Court only upheld the statute upon finding that the machines' *obvious intended purpose*

was gambling, and thus the statute could be validly applied even though the machines were temporarily in a state of disrepair. The slot machine involved in this case was *not* intended for the purpose of gambling, regardless of its state of repair.

The Louisiana Supreme Court cited *State of Louisiana v. Madere*, 352 So.2d 666 (La. 1977) as holding that slot machines were contraband irrespective of their actual use, in light of the amendment of La. R.S. 15:31 by Act 130 of 1972. However, the *Madere* case is not authority for the constitutional application of La. R.S. 15:31. The *Madere* decision only went so far as to define the scope of state officers' authority when acting pursuant to the amended provisions of La. R.S. 15:31.

The Louisiana Supreme Court concluded that La. R.S. 15:31 did not violate the federal constitution for the reasons expressed by this court in *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 705, 17 S.Ct. 693, 696, 41 L.Ed. 1169 (1897):

> "It is true that under the fourteenth amendment no state can deprive a person of his life, liberty, or property, without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent in which it has heretofore been regarded as within the police power. So far as

> property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but, so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

The antique slot machine involved in this case was stipulated to be insusceptible of gambling usage. Therefore, under the reasoning of this Court in the *Sentell* case, it could only be condemned or destroyed by legal proceedings, with due notice to its owner, Pat Brown. As Louisiana Supreme Court Justice Lemmon pointed out in his dissenting opinion, Pat Brown's antique could not reasonably be classified as either a gambling device or an instrumentality so dangerous to the safety or health of the community that its summary destruction is warranted.

Despite these authorities, the State has attempted to emphasize the fundamentally unlawful nature of slot machines by equating these devices to other property like obscene materials. However, equating slot machines to obscene materials does not strengthen the State's argument. In the case of *Stanley v. State of Georgia*, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969), this Court held that a Georgia statute, insofar as it made mere private possession of obscene matter a crime, was unconstitutional under the First and Fourteenth Amendments. Criminal sanctions cannot constitutionally be imposed on mere possessors or owners of

obscene materials until they have sold or distributed those materials.

Thus, if the State wishes to equate obscene materials and slot machines, the State must recognize that the mere possession of slot machines not used for gambling purposes is constitutionally protected from adverse state action.

Therefore, because the statute allows confiscation of a person's property, possession of which is not unlawful, without proof of conviction, without proof of the legality of the search and seizure, without proof that the gambling device does in fact come within the purview of the statute, without proof that the owner of the gambling device knew of, should have known of, or was involved in a criminal offense, and without any hearing or judicial determination at all, La. R.S. 15:31 offends the due process clauses of the U.S. Constitution, 5th and 14th Amendments.

II.

La. R.S. 15:31 Is Unconstitutionally Vague And Overbroad Because It Authorizes The Seizure And Destruction Of Any Machine Operable By Dropping A Coin Into A Slot Such As An Ordinary Gum Machine Or Coke Machine, Including Pat Brown's Collector's Item, An Antique, One-Cent Slot Machine.

La. R.S. 15:31 is unconstitutional because of its vagueness and overbreadth. La. R.S. 15:31 defines a gambling device as "any slot machine."

Overbreadth is that which "offends the constitutional principle that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom." *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967).

A slot machine is many things. *Webster's* defines a slot machine as "a machine whose operation is begun by dropping a coin into a slot." "Any slot machine" is the Coke machine located on the tenth floor of the Governmental Building, cigarette machines, candy machines and bubble gum machines. As a practical matter, any time coins are placed in those "slot" machines, the person so placing the money is gambling on a return. Accordingly, the State is authorized and the law enforcement officers of the State under La. R.S. 15:31 are mandated to seize and immediately destroy Coke machines, cigarette machines, candy machines and gum machines — to name a few.

The vagueness of the statute is further emphasized by the fact that the search warrant characterized this machine, not merely as "a slot machine", but as "a slot machine (one arm bandit)." If "slot machine" were not vague in its meaning the parenthetical phrase, "one

arm bandit", would certainly not have been necessary for identification of the machine and merely would have been redundant.

The vice of unconstitutional vagueness is aggravated where the statute in question operates to inhibit the exercise of individual freedom affirmatively guaranteed by the Federal Constitution. *Cramp v. Board of Public Instruction,* 368 U.S. 278, 7 L.Ed.2d 285, 82 S.Ct. 275. This statute should be found unconstitutionally vague since it impinges on Pat Brown's right not to be deprived of his personal property without due process of law, an individual freedom affirmatively guaranteed by the 5th Amendment to the Constitution, applicable to the states through the 14th Amendment.

It is true that non-criminal state statutes have been upheld by the Supreme Court against an attack on the ground of vagueness where statutory construction by the state's highest court has removed such alleged vagueness. *Hicklin v. Coney,* (1933) 290 U.S. 169, 78 L.Ed. 247, 54 S.Ct. 142. However, in this case, the vagueness and ambiguity of La. R.S. 15:31 have not been removed.

In fact, when the Louisiana Supreme Court last analyzed this statute, prior to the case at bar, that Court recognized the broad sweep of authority given to state officers acting pursuant to the statute. In *State of Louisiana v. Madere,* 352 So.2d 666 (La. 1977), the court found that state officers were mandated by this stat-

ute to seize all slot machines, irrespective of the nature of their usage. Therefore, this decision did nothing to clarify what particular slot machines would be subject to immediate seizure and destruction.

In its decision on this case (Appendix "A"), the Louisiana Supreme Court presumed that the Louisiana Legislature intended to authorize the seizure and destruction of all slot machines, regardless of whether those machines were susceptible of gambling usage or not. The court concluded that the Legislature must believe that all slot machines were inherently detrimental to the community. However, as already mentioned, this assumption as to the legislative intent was erroneous, in the face of the Louisiana Legislature's action on Senate Bill 470 of 1980. In this bill the Legislature clearly recognized the value of preserving antique slot machines not used for unlawful gambling. The nature of the bill was summarized in Footnote 5 of the Louisiana Supreme Court's opinion. Clearly, the Legislature was attempting to remove the vagueness and ambiguity present in La. R.S. 15:31, which gave state officers the sweeping power to summarily destroy valuable antiques. This bill was vetoed and the statute remained overly broad and vague.

La. R.S. 15:31 does not consider that "any slot machine" might not be a gambling device, and no hearing is afforded, by the state to raise that possible distinction. Thus, La. R.S. 15:31 is unconstitutionally vague and overbroad in that it authorizes the confisca-

tion and immediate destruction of all coin operated machines, from a penny gum machine to a thirty-five cent Coke machine, and allows valuable antiques, insusceptible of gambling usage, to be summarily seized and destroyed.

III.

The Search Warrant Which Served As The Basis For The State Police's Entrance Of Pat Brown's Premises And The Seizure Of His Antique, One-Cent Slot Machine Was Invalid Because It Was Based On An Affidavit Containing Only Hearsay Testimony: (A) Without Any Facts Ascertaining The Reliability Of The Informant; (B) Without Any Facts Verifying The Informant's Conclusion As To The Location Of The Machine; And (C) Without Any Facts Indicating That A Crime Was Being Committed.

The search warrant in the subject suit, which served as the basis for the State's seizure of the slot machine, was improperly issued.

In *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), this Court set forth, in a "two-pronged test", the criteria which a magistrate must follow in determining if an affidavit based upon hearsay has established probable cause for the issuance of the search warrant. These criteria are:

(1) The affiant must articulate the basis for his belief that the informant is trustworthy; and

(2) The affidavit must indicate the underlying circumstances from which the informant concluded that the object of the search warrant was where he contended it would be.

The search warrant which served as the basis for the seizure of the antique slot machine states:

> "The affiant, having been advised by Detective Betty Smothers of the Baton Rouge City Police Department, that the slot machine (one arm bandit) was at the above location at 12:30 P.M. on 7/17/79. The machine is located in the public restroom for women at Pat Brown's Claims Service." (Appendix "E")

Thus, this affidavit does not satisfy even the first *Aguilar* standard. The affidavit does not state who viewed the one-armed bandit. The affidavit does not set forth the facts which would indicate that Betty Smothers was the informant. It may well be that someone other than the detective saw the one-armed bandit and reported to Detective Betty Smothers. If Betty Smothers were not the informant, the affidavit certainly fails to establish that the informant is trustworthy.

Additionally, the affidavit does not satisfy the second *Aguilar* standard. The affidavit must satisfy the second *Aguilar* standard by indicating the underlying circumstances from which the informant concluded that the object of the search warrant was where the informant contended it would be. The affidavit in the instant case fails to set forth *any factual* circumstances from which the informant concluded that the slot machine was located at Pat Brown's Claims Service on Airline Highway. It merely states the conclusion that the slot machine was located at Pat Brown's Claims Service. It *does not* set forth the underlying circumstances from which the informant drew her conclusions, and further, erroneously states that the machine is located in a public bathroom. (See Stipulation of Fact, Appendix "E")

Affidavits must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. Thus, when an informant's statement fails to meet the "two-pronged test", the affidavit may, nevertheless, be sufficient if elsewhere in the application there is sufficient information to permit the suspicion engendered by the informant's report to ripen into a judgment that a crime was probably being committed.

Nowhere in the affidavit are there any facts to lead one to believe that any crime was being committed. It is not a crime to possess a slot machine in Louisiana. The only crime which can be committed under Louisiana

law in connection with the slot machine is that of gambling.

La. R.S. 14:90 defines gambling as:

> "The intentional conducting, or directly assisting in the conducting, *as a business*, of any game, contest, lottery or contrivance whereby a person risks the loss of anything of value *in order to realize a profit.*" (Emphasis added)

No facts are alleged in the affidavit in support of the issuance of the warrant which could possibly lead one to the conclusion that the slot machine was being used in gambling. Accordingly, the affidavit fails to make a sufficient showing of probable cause to believe that the crime of gambling had been committed; therefore, the search warrant was improperly issued.

For these reasons, the seizure in this case was in direct contravention of the Fourth Amendment of the United States Constitution, as applied through the Fourteenth Amendment to the states.

CONCLUSION

For the above outlined reasons, since petitioner's property has been seized and may be destroyed pursuant to a constitutionally defective Louisiana statute and an improperly issued search warrant, a writ of cer-

tiorari should issue to review the judgment and opinion of the Louisiana Supreme Court.

Respectfully submitted,

CAROLYN PRATT PERRY
Attorney of Record
Franklin, Moore & Walsh
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

April 24, 1981

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Louisiana have been served on the Honorable Howard P. Elliott, Jr., counsel of record for State of Louisiana, Department of Public Safety, P.O. Box 66614, Baton Rouge, Louisiana 70896, by depositing said copies in the U.S. mail, postage prepaid, this the ____ day of April, 1981.

I further certify that all parties required to be served have been served.

CAROLYN PRATT PERRY
ATTORNEY OF RECORD

APPENDIX "A"

SUPREME COURT OF LOUISIANA

PAT BROWN, JR.

versus No. 67,720

STATE OF LOUISIANA,
THROUGH DEPARTMENT OF
PUBLIC SAFETY, DIVISION OF
LOUISIANA STATE POLICE

On Writ of Certiorari or Review to
The Court of Appeal, First Circuit,
Parish of East Baton Rouge.

Filed: Dec. 15, 1980

CALOGERO, Justice

The State of Louisiana, relator herein, seeks review of a holding of the First Circuit Court of Appeal, affirming a judgment of the trial court and declaring R.S. 15:31 unconstitutional. Louisiana Revised Statute 15:31 mandates that law enforcement officers confiscate and immediately destroy all gambling devices that come to their attention. . . . "gambling devices means: (1) any slot machine; . . ." R.S. 15:31 B(1).

The Louisiana State Police, acting on information that there was a slot machine in the women's restroom

of Pat Brown's Claim Service located in Baton Rouge, seized the machine. Pat Brown, Jr., filed suit seeking an injunction to prevent the police from destroying the slot machine, and requesting that the police be ordered to return it. Plaintiff and defendant stipulated to a number of facts regarding the slot machine: that it was an antique slot machine; that it was a one-cent machine, operable by the insertion of a penny, and not operable by insertion of other coins of greater monetary value; that the machine was operable at the time of seizure; that the machine was not used for gambling purposes; and that the coin box of the machine where deposited coins are stored did not have a lock, so that the coins once deposited could be reclaimed by anyone depositing a penny in the coin slot. Both sides further stipulated that no criminal charges for gambling had been filed against Pat Brown, Jr., as a result of his possession of the slot machine and that the restroom from which the slot machine was seized is not generally open to the public.

The trial court granted the relief sought by plaintiff, ordering that the slot machine be returned to plaintiff. The state appealed that decision to the First Circuit Court of Appeal which affirmed the trial court and declared R.S. 15:31 unconstitutional. The statute at issue requires law enforcement officers to confiscate and destroy three kinds of specified "gambling devices" and also orders the destruction, following conviction of an individual for gambling, of other kinds of "machines used for gambling." In pertinent part, R.S. 15:31 reads:

"A. All law enforcement officers of municipal police forces, sheriffs' departments and the division of state police are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all gambling devices or machines used for gambling that come to their attention.

"B. As used in this section the term "gambling device" means:

(1) any slot machine; or (2) any machine, mechanical or electronic device of any sort whatsoever with a cash automatic payout device; or (3) a pinball or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or free plays so released.

"C. Whenever any other machine, mechanical or electronic device, including but not limited to roulette wheels and similar devices, designed and manufactured primarily for use in connection with gambling, and (1) which, when operated, may deliver, as the result of the application of an element of chance, any money or property, or (2) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property, is used to conduct gambling, then following the

conviction of any person for the crime of gambling by use of any such machine or device, the court wherein the verdict of guilty was returned shall order the immediate destruction of the machine or device by the proper law enforcement agency of the parish wherein the machine or device was used for gambling.

"D. Whenever any machine or other mechanical or electronic device of any kind whatsoever, not designed and manufactured primarily for use in connection with gambling, including specifically but not limited to coin-operated bowling games, shuffle alleys, mechanical baseball games, pinball games, mechanical guns, electronic ray guns, digger type machines, iron claws, and all similar types of coin-operated games, is used to conduct gambling, then following the conviction of any person for the crime of gambling by use of any such machine or device, the court wherein the verdict of guilty was returned shall order the immediate destruction of the machine or device by the proper law enforcement agency of the parish wherein the machine or device was used for gambling.

"E. . . ."

It is plaintiff's contention, and the Court of Appeal so ruled, that the above statute allows the state to take

personal property without due process of law. We disagree and reverse the holding of the lower court.

In State v. Madere, 352 So.2d 666 (La. 1977), we declined to address the constitutionality of R.S. 15:31 because the issue had not been raised in the lower court. In *Madere* we did hold, however, that the statute provides for the destruction of slot machines irrespective of their use for gambling. In our view, the legislature distinguished "gambling devices" from "machines used for gambling" and defined gambling devices without reference to use. A slot machine is one of three machines included in the group of items referred to as "gambling devices."[1]

In State v. Ricks, 215 La. 602, 41 So.2d 232 (1949), we upheld a predecessor statute to R.S. 15:31 against a similar due process attack. Our decision in *Ricks* was grounded on Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). In *Lawton*, the United States Supreme Court was asked to declare that a New York statute, which provided for summary destruction of nets used for taking or capturing fish illegally, violated the Fourteenth Amendment of the United States Constitution because it ordered the confiscation of proper-

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1 The other two are "any machine, mechanical or electronic device of any sort whatsoever with a cash automatic payout device" and a "pinball or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or free plays so released." R.S. 15:31 B(2), (3).

ty without a hearing. The United States Supreme Court, instead, held that the law did not violate the Constitution because "the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the constitution. . ." 152 U.S. at 142, 14 S.Ct. at 503.

The provisions of the Louisiana Constitution pertinent to our determination are Article I, §2; Article I, §4 and Article XII, §6. Article I, §2 provides: "No one shall be deprived of life, liberty, or property, except by due process of law." Regarding property, Article I, §4 makes provision for the right to the ownership, use and enjoyment of private property. The statement of the right to private property is immediately followed by the pronouncement that the right is subject to "reasonable statutory restrictions and the reasonable exercise of the police power."[2] The second paragraph of that very section makes indirect reference to the fact that personal effects which constitute contraband are subject to taking by the government.[3] Finally, Article XII, §6, separate and distinct from the two foregoing pro-

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2 Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L.Rev. 1, 12 notes: "The background of [this] provision indicates an understanding that the statutory limitations and police power regulations are to be given a broad ambit."

3 ". . . Personal effects, other than contraband, shall never be taken." This is the last sentence of a paragraph which speaks of expropriation. Nevertheless, the reference to contraband is clear.

visions, directs the Legislature to define and suppress gambling.[4]

Louisiana constitutions since 1879 have contained directives similar to that now found in Article XII, §6. In response to these directives, the legislature passed the predecessor acts to the current R.S. 15:31. Acts 1898, No. 57, and Acts 1908, No. 107, made it a misdemeanor to use or play slot machines and a misdemeanor to have slot machines on the premises if the machines were in use or if any business was being conducted on the premises. In 1928, the legislature enacted Act No. 231 providing for the summary destruction by the police of "all gambling devices known as slot machines that may come to their attention, or that they may find in operation." With the codification of the criminal statutes of the state in 1942 (Act No. 43), the legislature repealed the acts which made it a misdemeanor to play or possess slot machines. Acts 1928, No. 231, has been refined and embellished by the legislature through the years but the essential elements remain the same: the police may summarily destroy slot machines.

Respondent argues that the absence of a statute prohibiting the possession and use of slot machines removes them from the designation contraband. We

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4 "Neither the state nor any of its political subdivisions shall conduct a lottery. Gambling shall be defined by and suppressed by the legislature." La. Const. Art. XII, §6.

answer this argument by observing that slot machines have historically been treated as contraband. Since the repeal of the statutes making possession and use of slot machines illegal, this Court has consistently referred to slot machines as contraband. In State v. Ricks, *supra*, we noted that Acts 1928, No. 231, declared slot machines to be contraband and the destruction of slot machines without notice or hearing did not render the statute unconstitutional because Mr. Ricks "cannot have or acquire property rights in the condemned article." 41 So.2d at 234.

In Killian v. Craft, 226 La. 374, 379, 76 So.2d 401, 402 (1954), we said that "slot machines are contraband and not property capable of private ownership." Following Gascon v. State, Department of Public Safety, 263 So.2d 81 (La. App. 1st Cir. 1972), in which the appellate court held that slot machines not being used in gambling were not contraband, the legislature amended R.S. 15:31 in such a way as to remove any doubt that the slot machines did not have to be used in gambling to subject them to summary destruction. This amendment formed the basis of our holding in *Madere, supra*.

The legislature, by providing for the summary destruction of slot machines, has followed the constitutional mandate to suppress gambling. R.S. 15:31 constitutes at least as direct a legislative pronouncement that slot machines are contraband as would a statute simply making their possession illegal.

In summary, the challenged statute does not violate the federal constitution for the reasons expressed by the United States Supreme Court in Sentell v. New Orleans & C.R. Co., 166 U.S. 698, 705, 17 S.Ct. 693, 696 (1897):

> "It is true that under the fourteenth amendment no state can deprive a person of his life, liberty, or property without due process of law; but in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent in which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but, so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction."

Nor does R.S. 15:31 offend the Louisiana constitutional provisions regarding due process and the right to private property. As we interpret these provisions alongside others which direct the legislature to suppress gambling and which make reference to contraband, we find no intention on the part of the Constitutional Convention or the people to prohibit legislation such as R.S. 15:31. The legislature followed the constitutional directive to suppress gambling by providing for the summary destruction of slot machines. In the latest

definitive statutory expression of the legislature[5] of this state, slot machines are inherently detrimental to the community and thus properly the subject of summary destruction.[6]

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5 In this regard, we do note that SB 470 of 1980 removed *antique* gaming machines (those constructed prior to October 1, 1950, and presumably including slot machines of that early vintage) from the classification as a gambling device. The bill authorized the ownership and possession of such machines, unless used for unlawful gambling. In that situation, the bill authorized their seizure, but only when found being used for gambling, and required that they not be destroyed until there was judgment of a court that they were indeed used for unlawful gambling. SB 470 passed both houses of the Louisiana Legislature unanimously, but was vetoed by the governor after the close of the 1980 legislative session.

6 Our holding in this case is limited to the issue of summary seizure and destruction of "gambling devices" as defined in paragraph B of the above statute. We are specifically not considering the right of the police to seize and destroy "machines used for gambling" other than the "gambling devices" listed in B. While paragraph A of the statute seems to give the police the right to summarily seize and destroy these other machines also, we note that paragraphs C and D require, prior to destruction, conviction of a person for the crime of gambling, R.S. 14:90. R.S. 14:90.1, added by the legislature in 1979, reiterates the conviction requirement before machines other than "gambling devices" are to be disposed of:

> "Upon conviction of a person for the crime of gambling, the evidence, property, and paraphernalia seized as instruments of such crime shall, upon order of the Court, be destroyed when it is no longer needed as evidence and all such evidence, property, and paraphernalia found to be in use in the conduct of such unlawful activity and having a value for lawful purposes, shall be sold under the orders of the Court at public auction by a duly licensed auctioneer and the proceeds paid into the Court. Upon conviction, as aforesaid, any monies and

Accordingly, the holding of the Court of Appeal that R.S. 15:31 is unconstitutional is reversed and the trial court's order that the state return the slot machine to the plaintiff is dissolved.

REVERSED.

SUPREME COURT OF LOUISIANA

No. 67,720

PAT BROWN, JR.

VERSUS

STATE OF LOUISIANA,
THROUGH THE DEPARTMENT OF
PUBLIC SAFETY, DIVISION OF
LOUISIANA STATE POLICE

---

other things of value, except as herein provided, shall be transferred to the state general fund."

Furthermore, even without the statutory limitations, there are more serious due process and right to private property considerations regarding machines not specifically enumerated and identified as "gambling devices" in the statute.

WATSON, Justice, dissenting.

I disagree with the majority's conclusion that an antique slot machine operated with pennies is so dangerous to the community that its summary destruction is authorized. Since it was stipulated that the machine was not used for gambling purposes, it cannot be included constitutionally in the statutory prohibition of LSA-R.S. 15:31. The Court of Appeal opinion presents a correct analysis.

Therefore, I respectfully dissent.

SUPREME COURT OF LOUISIANA

NO. 67,720

PAT BROWN, JR.

VERSUS

STATE OF LOUISIANA, THROUGH
DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF LOUISIANA STATE POLICE

LEMMON, Justice, Dissenting.

Since the coin box did not have a lock, this machine could not in fact be used for gambling purposes and

therefore could not reasonably be classified as either a gambling device or an instrumentality which is so dangerous to the safety or health of the community that its summary destruction is warranted. Accordingly, R.S. 15:31 is inapplicable, and it is unnecessary to reach the constitutional issue.

I dissent from the decision declaring the statute unconstitutional.

APPENDIX "B"

PAT BROWN, JR.

versus

STATE OF LOUISIANA,
THROUGH DEPARTMENT OF PUBLIC
SAFETY, DIVISION OF
LOUISIANA STATE POLICE.

No. 13316.

Court of Appeal of Louisiana,
First Circuit.

May 5, 1980.

Before COVINGTON, LOTTINGER and COLE, JJ.

COLE, Judge.

This appeal puts at issue the constitutionality of La.R.S. 15:31 as it relates to the summary seizure and destruction of slot machines.

Pat Brown, Jr. filed suit to enjoin the State of Louisiana through the Department of Public Safety, Division of Louisiana State Police Department, from destroying an antique slot machine seized by defendant from Brown's place of business. Brown also sought return of the seized machine. The trial court held for Brown. Defendant appeals.

The case was tried on a written stipulation of facts, which set forth the following: the slot machine in question was seized from the women's restroom of Pat Brown's Claim Service; the machine seized was an operable, one-cent antique slot machine in the possession of Pat Brown, Jr.; the coin box on the machine did not have a lock; the slot machine was not used for gambling purposes; no criminal charges were brought against Brown arising out of his possession of the slot machine.

La.R.S. 15:31, the statute under which the seizure was made, reads as follows:

A. All law enforcement officers of municipal police forces, sheriffs' departments and the division of state police are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all gambling devices or machines used for gambling that come to their attention.

B. As used in this section the term "gambling device" means:

(1) any slot machine; or (2) any machine, mechanical or electronic device of any sort whatsoever with a cash automatic payout device; or (3) a pinball or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or free plays so released.

C. Whenever any other machine, mechanical or electronic device, including but not limited to roulette wheels and similar devices, designed and manufactured primarily for use in connection with gambling, and (1) which, when operated, may deliver, as the result of the application of an element of chance, any money or property, or (2) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property, is

used to conduct gambling, then following the conviction of any person for the crime of gambling by use of any such machine or device, the court wherein the verdict of guilty was returned shall order the immediate destruction of the machine or device by the proper law enforcement agency of the parish wherein the machine or device was used for gambling.

D. Whenever any machine or other mechanical or electronic device of any kind whatsoever, not designed and manufactured primarily for use in connection with gambling, including specifically but not limited to coin-operated bowling games, shuffle alleys, mechanical baseball games, pinball games, mechanical guns, electronic ray guns, digger type machines, iron claws, and all similar types of coin-operated games, is used to conduct gambling, then following the conviction of any person for the crime of gambling by use of any such machine or device, the court wherein the verdict of guilty was returned shall order the immediate destruction of the machine or device by the proper law enforcement agency of the parish wherein the machine or device was used for gambling.

E. The ownership of a federal gambling stamp for any machine or device, other than a machine commonly known as an "iron claw"

> or a "digger" machine, shall be absolute proof of its use for purposes of gambling, and neither the State of Louisiana nor any subdivision, agency, agent or enforcement officer shall be liable civilly or criminally for the destruction of any gambling device or gambling machine for which a federal gambling stamp has been issued.

In the case of *State v. Madere*, 352 So.2d 666 (La. 1977), the Louisiana Supreme Court held the above statute mandated the summary seizure and destruction of slot machines and other "gambling devices" without regard to whether they were used to conduct gambling. In view of this interpretation, there can be no doubt that defendant was authorized by La. R.S. 15:31 to seize and destroy Brown's antique slot machine.

Brown challenges defendant's action on the ground that La.R.S. 15:31 is a denial of due process and the right to property guaranteed by the Louisiana Constitution of 1974. Brown correctly points out that pursuant to La.R.S. 15:31 any device determined by a law enforcement officer to be a slot machine is subject to seizure and destruction without any judicial intervention and without notice or opportunity for a hearing. Nor does the statute require the confiscation be in conjunction with a conviction for a crime related to the possession or use of the slot machine. Indeed, possession of a slot machine has not been defined as a crime.

Only when a slot machine is used to commit the crime of gambling[1] is there any reprobated activity.

The pertinent provisions of the Louisiana Constitution are Article I §2 and Article 1 §4:

> §2. Due Process of Law
>
> No person shall be deprived of life, liberty, or property, except by due process of law.
>
> §4. Right to Property
>
> Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> * * * * * * *
>
> Personal effects, other than contraband, shall never be taken.

It has long been recognized that a state through the exercise of its police power can constitutionally act to summarily confiscate and destroy things which cannot be put to a lawful use. However if the thing seized is susceptible of a legal use, due process requires notice

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1 La. R.S. 14:90(A) in pertinent part defines the crime of gambling as follows:

> Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

and opportunity for a hearing. 38 Am.Jur.2d *Gambling* §174; 16A C.J.S. *Constitutional Law* §645; 14 A.L.R.3d *Gambling Devices—Destruction* 368.

In La.R.S. 15:31, the legislature has in effect made slot machines contraband, treating them as though they were insusceptible of lawful possession. Yet their possession is not a crime and their use is illegal only when it is in connection with the crime of gambling. Although contraband is excluded from protection from confiscation in Article 1 §4 of the 1974 Constitution, the state's power to classify a thing as contraband is limited by due process considerations and by the provision that property rights can be curtailed only by reasonable statutory restrictions and the reasonable exercise of the police power. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La.L.Rev. 1, 20 (1974). We do not think the laudable purpose of suppressing gambling can justify summary seizure and destruction of items legally possessed which are not being used for gambling.

Our Supreme Court had occasion in *State v. 1971 Green GMC Van*, 354 So.2d 479 (La. 1977), to consider the application of Article 1 §4 of our constitution as regards the seizure and forfeiture of private property. Noting Article 1 §4 was intended to give far-reaching new protection to the right of citizens to own and control private property, the court held R.S. 40:989(A)(4) dealing with the forfeiture of conveyances used to transport controlled dangerous substances to be an un-

reasonable restriction on the right to property guaranteed by this provision. The court also defined contraband as property insusceptible of ownership. "It is an article, such as an illegal drug, the possession of which is proscribed by law," said the court.

We find the reasoning in *State v. 1971 Green GMC Van*, supra, to furnish appropriate guidelines in determining whether the one-cent antique slot machine in this case is contraband. We hold it is not contraband but personal property protected by Article 1 §4 of the Constitution.

We conclude La.R.S. 15:31 to be unconstitutional as violative of both Article 1 §2 and Article 1 §4 of our constitution. Our finding of unconstitutionality is, however, limited to that part of the statute which deals with the confiscation and immediate destruction, without judicial proceedings, of those items included within the definitional term "gambling device."

For the foregoing reasons, the judgment of the lower court is affirmed. Costs in the amount of $113.75 are to be paid by defendant-appellant.

AFFIRMED.

LOTTINGER, J., dissents and assigns written reasons.

LOTTINGER, Judge, dissenting.

I respectfully dissent and disagree with the holding of the majority that La.R.S. 15:31 is unconstitutional to the extent that it authorizes and compels the confiscation and destruction, without judicial proceedings, of those items defined as "gambling devices."

The majority admits the suppression of gambling is laudable, but concludes it should be restricted only where a device is being used for gambling. I find the majority's reliance on *State v. 1971 Green GMC Van*, 354 So.2d 479 (La. 1977), to be misplaced.

In *State v. Ricks*, 215 La. 602, 41 So.2d 232 (1949), Act 231 of 1928, the predecessor legislation of La.R.S. 15:31, came under a due process constitutional attack. The 1928 Act authorized the confiscation and destruction of slot machines.[1] In upholding the constitutionality the court said:

> "And the fact that destruction of the slot machine is ordered without notice or hearing does not render the statute unconstitutional as depriving any claimant thereto of due

1 Art. 231 of 1928 provides:
"That all officers of the State of Louisiana are hereby authorized and empowered, and it is made mandatory and compulsory on their part, to confiscate and immediately destroy all gambling devices known as slot machines that may come to their attention, or that they may find in operation."

process — as he cannot have or acquire property rights in the condemned article."

See also the dissent by Gulotta, J. in *State v. Madere*, 344 So.2d 29, 32 (La. App. 4th Cir. 1977). I too agree the statute is constitutional.

The people speak through the legislature, and as long as its actions are constitutional, it is not for this court or any other court to question its wisdom.

Therefore, for the above reasons I respectfully dissent.

APPENDIX "C"

19th Judicial District Court
Parish of East Baton Rouge
State of Louisiana

PAT S. BROWN, JR.

versus Number 226,405
Division G

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF LOUISIANA STATE
POLICE DEPARTMENT

WRITTEN REASONS FOR JUDGMENT

In this proceeding, the plaintiff seeks the return of a device which has been stipulated to be an operable penny slot machine which is not used for gambling purposes, and the coin box of which is not locked so that any penny deposited can be reclaimed by the person depositing same. The device was seized by the state police pursuant to a search warrant authorized by the Nineteenth Judicial District Court. Its destruction was restrained by the Court until a hearing could be had and the parties have agreed that it will not be destroyed pending the final termination of this litigation.

The statutes of this state mandate law enforcement officers to confiscate and immediately destroy all gambling devices *or* machines used for gambling that come to their attention. "Any slot machine" is included in the definition of gambling devices subject to confiscation and destruction. Plaintiff has raised serious constitutional objections to both the validity of the search warrant and to the statute itself. It is a truism that hard facts make bad law. If this case were litigated through all the appellate courts, it is doubtful that a completely satisfactory balancing of the laudatory aims of the state statute and the broad personal constitutional guarantees afforded by our state and federal constitution would be reached since either, if expounded to a logical extreme, would tend to clash with the other. Certainly the time and judicial talent required would be all out of proportion to the particular facts here involved.

The Court today reaches the end of its four-month appointment by the Louisiana Supreme Court. Hopefully, and reasonable men might differ in their conclusion, it has made some positive contribution to the administration of justice in a system that is, at best, imperfect, but in all its imperfections is still far superior to any other system yet devised by man. Somehow it seems inappropriate to end this service by either straining the interpretation of the statute to avoid including the device in question within its ambit or to enforce its letter to require the destruction of the device despite the particular and unique facts of this case. The law enforcement people have performed their statutory duty; the device would have been immediately destroyed but for the intervention of the judiciary. The Court will order the return of the device to the plaintiff and suggests that the interest of justice, as well as of law and order, would be best served if the matter were to terminate at this point.

Judgment will be signed accordingly.

Baton Rouge, Louisiana, this 31st day of August, 1979.

/s/ ROBERT L. ROLAND
ROBERT L. ROLAND
JUDGE, DIVISION G
NINETEENTH JUDICIAL
DISTRICT COURT

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

PAT S. BROWN, JR.

versus Number 226,405
Division "G"

STATE OF LOUISIANA, THROUGH
THE DEPARTMENT OF PUBLIC
SAFETY, DIVISION OF LOUISIANA
STATE POLICE DEPARTMENT

JUDGMENT

This cause came on for hearing on petition for injunctive relief pursuant to regular assignment and after notice.

Present in Court:

Carolyn Pratt Perry, attorney for plaintiff, and

Howard P. Elliott, Jr., attorney for the State of Louisiana, through the Department of Public Safety.

Pursuant to the Court's request and stipulation of counsel, the issues were submitted on a written stipulation of fact and memoranda of authority; the Court, after considering the pleadings, and stipulation of facts, and the law, rendered judgment herein in favor of the plaintiff on the 31st day of August, 1979 for written reasons filed in the record.

IT IS ORDERED, ADJUDGED AND DECREED that the State of Louisiana, through the Department of Public Safety, Division of State Police, its officers, agents, employees and all other persons acting on their behalf are hereby enjoined from destroying, altering, modifying or in anyway tampering with that certain antique one-cent slot machine, belonging to plaintiff seized by defendant on or about July 17, 1979.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that defendant return to plaintiff the antique one-cent slot machine seized on or about July 17, 1979.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant pay all costs of these proceedings, for which defendant may properly be cast.

Baton Rouge, Louisiana, this 12th day of September, 1979.

/s/ ROBERT L. ROLAND
JUDGE, 19TH JUDICIAL
DISTRICT COURT

APPENDIX "D"

EXHIBIT "A"

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

PAT S. BROWN, JR.

versus Number 226,405
Division "G"

STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE LOUISIANA
STATE POLICE DEPARTMENT

WRITTEN STIPULATION OF FACTS

1.

The State of Louisiana, through the Department of Public Safety, Division of State Police, their officers and agents agree and stipulate that during the pendency of this litigation, whether in the trial or appellate courts, that certain slot machine belonging to Pat S. Brown, Jr. and made the subject of this litigation will not be altered, tampered with or destroyed.

2.

The slot machine in question was an antique slot machine.

3.

The slot machine in question was a one-cent machine, operable only by insertion of a penny, and not operable by insertion of other coins of greater monetary value.

4.

The slot machine in question was the personal property of Pat S. Brown, Jr.

5.

The slot machine in question is and was at the time of seizure operable.

6.

The slot machine in question was not used for gambling purposes.

7.

No criminal charges for gambling have been brought against Pat S. Brown, Jr. arising out of his possession of the antique slot machine in question.

8.

The slot machine coin box where deposited coins are stored does not have a lock, and coins once deposited can be reclaimed by anyone so depositing a penny in the coin slot.

9.

At the time of the seizure the slot machine was located on a bathroom countertop located in the women's restroom of the Pat S. Brown, Jr. Claim Service at 10466 Airline Highway.

10.

The restroom wherein the machine was stored is not generally open to the public.

11.

The search warrant attached hereto is a search warrant under which the State asserted its authority to seize the machine in question.

FRANKLIN, MOORE & WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
Telephone: (504) 383-2608

By: _____
Daniel J. Dziuba
Attorney for Plaintiff

STATE OF LOUISIANA
DEPARTMENT OF PUBLIC
SAFETY
DIVISION OF STATE POLICE

By: _____
Howard Elliott
Attorney for Defendant

SEARCH WARRANT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

TO: The within named affiant or any other qualified law enforcement officer or officers:

On this day TFC DOUGLAS PETERS, LOUISIANA STATE POLICE, affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF LOUISIANA, I order and command that you search during the day and night, Sundays and Holidays, continuing through the night or next day, the following described place:

PAT BROWN'S CLAIM SERVICE
10466 AIRLINE HIGHWAY
BATON ROUGE, LA

A GRAYISH BRICK BUILDING, FACING EAST ON THE WEST SIDE OF AIRLINE HIGHWAY

and to seize, secure, tabulate and make return according to law the following property and things:

ONE SLOT MACHINE, RED IN COLOR, WITH 1¢ OPERATION ON IT. THERE IS A COMBINATION OF FRUIT SYMBOLS TO WIN WHEN SELECTED. THE RIGHT SIDE OF THIS MACHINE IS AN ARM OF WHICH TO PULL TO MAKE A COMBINATION SELECTION FOR MONETARY VALUES

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

THE AFFIANT, HAVING BEEN ADVISED BY DETECTIVE BETTY SMOTHERS OF THE BATON ROUGE CITY POLICE DEPARTMENT, THAT THE SLOT MACHINE (ONE ARM BANDIT) WAS AT THE ABOVE LOCATION AT 12:30 P.M. On 7/17/79. THE MACHINE IS LOCATED IN THE PUBLIC BATHROOM FOR WOMEN AT PAT BROWN'S CLAIM SERVICE.

THE AFFIANT WAS NOTIFIED BY DETECTIVE SMOTHERS DUE TO THE FACT THAT 10466 AIRLINE HIGHWAY IS OUTSIDE THE BATON ROUGE CITY LIMITS. BEING A STATEWIDE LAW ENFORCEMENT AGENCY, THE AFFIANT IS ASSISTING THE BATON ROUGE CITY POLICE IN

THE CONFISCATION OF THE ABOVE CONTRABAND ITEM.

WHEREFORE, THERE IS PROBABLE CAUSE, AND THE AFFIANT DOES BELIEVE THAT THERE IS PRESENTLY BEING CONCEALED AT THE PREMISES KNOWN AS 10466 AIRLINE HIGHWAY, BATON ROUGE, LA., A RED SLOT MACHINE AND OTHER ITEMS WHICH ARE EVIDENCE THAT CRIMES HAVE BEEN COMMITTED AND ARE FRUITS OF SAID CRIMES.

ISSUED UNDER MY HAND THIS 17th DAY OF JULY, 1979 at 5:15 P.M.

/s/ J. S. COVINGTON
Judge Of 19th Judicial
District Court
East Baton Rouge Parish
State of Louisiana

APPENDIX "E"

IN THE SUPREME COURT
OF THE STATE OF LOUISIANA

PAT BROWN, JR., Appellant

versus No. 67,720

STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF LOUISIANA
STATE POLICE, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Pat Brown, Jr., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Louisiana denying a rehearing on its judgment reversing the First Circuit Court of Appeal's decision holding La. R.S. 15:31 unconstitutional, entered in this suit on January 26, 1981.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

By Attorneys:

FRANKLIN, MOORE & WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

/s/ CAROLYN PRATT PERRY
CAROLYN PRATT PERRY
Attorney for Pat Brown, Jr.,
Appellant

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing has been mailed, postage prepaid, to all counsel of record in this matter.

Baton Rouge, Louisiana, this 8th day of April, 1981.

/s/ CAROLYN PRATT PERRY
CAROLYN PRATT PERRY

IN THE
SUPREME COURT OF THE
STATE OF LOUISIANA

PAT BROWN, JR., APPELLANT

VERSUS No. 67,720

STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF LOUISIANA
STATE POLICE, APPELLEE

AFFIDAVIT OF SERVICE PURSUANT
TO RULE 28.5(c)

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

I, Carolyn Pratt Perry, an attorney in the offices of Franklin, Moore & Walsh, attorneys of record for Pat Brown, Jr., appellant herein, depose and say that on the 8th day of April, 1981, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the State of Louisiana, appellee herein, by delivering the same to the receptionist in the offices of Howard P. Elliott, Jr., counsel of record for said State of Louisiana, located at Department of Public Safety, P.O. Box 66614, Baton Rouge, Louisiana 70896.

/s/ CAROLYN PRATT PERRY
CAROLYN PRATT PERRY

SUBSCRIBED AND SWORN to before me at Baton Rouge, Louisiana, this 15th day of April, 1981.

/s/ CHARLES A. O'BRIANT, III
NOTARY PUBLIC

SEAL

APPENDIX "F"

LC 80-2176
Regular Session, 1980

SENATE BILL NO. 470

BY MR. BRINKHAUS

AN ACT

To amend Title 15 of the Louisiana Revised Statutes of 1950 by adding thereto a new Section to be designated as Section 31.1 thereof, to provide for the ownership and possession of antique slot machines, gambling devices, and gaming machines, their exemption from confiscation and destruction without a judgment of court, the seizure thereof, the rights of owners thereof to present testimony and other evidence in court in connection with the operation thereof for unlawful gambling, and court orders for destruction thereof for operation for unlawful gambling purposes, and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 31.1 of Title 15 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§31.1 Antique slot machines, gambling devices, and gaming machines

A. For the purposes of this Section, a gambling device, slot machine, or gaming machine is an antique if it was manufactured prior to October 1, 1950.

B. Notwithstanding any provisions of Section 31 of this Title, or R.S. 14:90.1, or any other provisions of law to the contrary, an antique slot machine, antique gambling device, or antique gaming machine may be owned and possessed in this state and shall not be subject to confiscation or destruction without a judgment of court as provided in this Section, but may be seized as evidence when operated for unlawful gambling purposes.

C. An antique slot machine, antique gambling device, or antique gaming machine seized as evidence in connection with unlawful gambling shall not be destroyed, altered, or sold until the owner has been afforded a reasonable opportunity to present testimony and other evidence in court that his antique slot machine, antique gambling device, or antique gaming machine was not operated for unlawful gambling while in his possession or with his consent, and it is determined by a final and definitive judgment of court that such slot machine, gambling device, or gaming machine was operated for unlawful gambling while in its owner's possession or with its owner's consent, in which event the court

shall order the destruction of the slot machine, gambling device, or gaming machine. Otherwise, if the judgment is in favor of the owner, such antique slot machine, antique gambling device, or antique gaming machine shall be returned to its owner.

D. It is the purpose of this Section to protect and foster the collection and restoration of antique slot machines, antique gambling machines, and antique gaming devices, not used for gambling purposes, due to their esthetic value and importance in Louisiana history.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items, or applications of this Act which can be given effect without the invalid provisions, items, or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

APPENDIX "G"

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4.	5¢	Mills Silent Mystery	$1,600.00
5.	5¢	Watling Treasury	$5,000.00
6.	1¢	Jennings Little Duke	$2,200.00
7.	5¢	Mills Thunderbird Q.T.	$1,300.00
8.	5¢	Unique Mills C.O.K. ("N" replaces Owl)	$2,900.00
9.	25¢	Mills Black Cherry	$1,600.00
10.	50¢	Mills Golden Falls	$1,600.00

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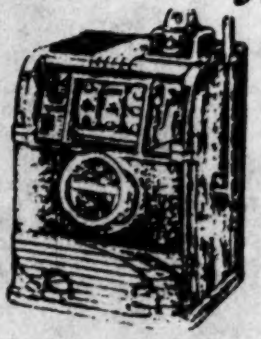

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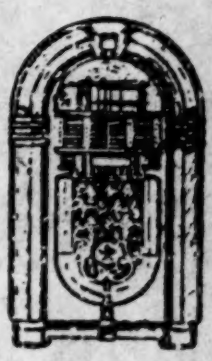

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SUN., APRIL 12, 1981 (1:00 PM to 6:00 PM)

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APPENDIX "H"

CONSTITUTIONAL PROVISIONS AND STATUTES

I.

La. R.S. 14:90 Gambling

A. Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.

Whoever commits the crime of gambling shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

B. The conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance on board a commercial cruise ship used for the international carriage of passengers whereby a person risks the loss of anything of value in order to realize a profit is not gambling and shall not be suppressed by any law enforcement officer of the State of Louisiana or any of its political subdivisions. This Subsection shall apply only to commercial cruise ships for the carriage of passengers which are sailing from a port outside the continental limits of the United States to a port in any parish of this state having a population of more than five hundred thousand or any such ship which is sailing from a port in such a parish to a port

outside the continental limits of the United States, provided that the ship is not docked or anchored but is navigating enroute between such ports. Amended by Acts 1979, No. 633, §1.

II.

La. R.S. 15:31 Confiscation and destruction of gambling devices

A. All law enforcement officers of municipal police forces, sheriffs' departments and the division of state police are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all gambling devices or machines used for gambling that come to their attention.

B. As used in this section the term "gambling device" means:

(1) any slot machine; or (2) any machine, mechanical or electronic device of any sort whatsoever with a cash automatic payout device; or (3) a pinball or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or free plays so released.

C. Whenever any other machine, mechanical or electronic device, including but not limited to roulette

wheels and similar devices, designed and manufactured primarily for use in connection with gambling, and (1) which, when operated, may deliver, as the result of the application of an element of chance, any money or property, or (2) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property, is used to conduct gambling, then following the conviction of any person for the crime of gambling by use of any such machine or device, the court wherein the verdict of guilty was returned shall order the immediate destruction of the machine or device by the proper law enforcement agency of the parish wherein the machine or device was used for gambling.

D. Whenever any machine or other mechanical or electronic device of any kind whatsoever, not designed and manufactured primarily for use in connection with gambling, including specifically but not limited to coin-operated bowling games, shuffle alleys, mechanical baseball games, pinball games, mechanical guns, electronic ray guns, digger type machines, iron claws, and all similar types of coin-operated games, is used to conduct gambling, then following the conviction of any person for the crime of gambling by use of any such machine or device, the court wherein the verdict of guilty was returned shall order the immediate destruction of the machine or device by the proper law enforcement agency of the parish wherein the machine or device was used for gambling.

E. The ownership of a federal gambling stamp for any machine or device, other than a machine commonly known as an "iron claw" or a "digger" machine, shall be absolute proof of its use for purposes of gambling, and neither the State of Louisiana nor any subdivision, agency, agent or enforcement officer shall be liable civilly or criminally for the destruction of any gambling device or gambling machine for which a federal gambling stamp has been issued. Amended by Acts 1972, No. 130 §1, eff. Jan. 1, 1973.

III.

U.S. Constitution, 4th Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

IV.

U.S. Constitution, 5th Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

V.

U.S. Constitution, 14th Amendment

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of

representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

80-1786

No._____

Office-Supreme Court, U.S.
FILED
MAY 26 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

PAT BROWN, JR.

Petitioner,

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE POLICE

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Louisiana

RESPONDENT'S BRIEF IN OPPOSITION

JAMES C. DIXON
Attorney of Record
State of Louisiana
thru Department of
Public Safety
P. O. Box 66614
Baton Rouge, Louisiana 70896
(504) 925-6103

QUESTIONS PRESENTED

1. Whether the State of Louisiana, through the reasonable exercise of its police power can declare *gambling slot machines* to be contraband, and provide for their summary seizure and destruction.

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No._____

In the
Supreme Court of the United States

OCTOBER TERM, 1980

PAT BROWN, JR.

Petitioner,

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF STATE POLICE

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Louisiana

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On July 17, 1979, detectives of the Louisiana State Police executed a valid search warrant issued by the Nineteenth Judicial District Court. Pursuant thereto, they entered the premises of petitioner Pat S. Brown, Jr. and confiscated therefrom one (1) slot machine. The search warrant was issued pursuant to LSA-R.S. 15:31 which mandates the summary confiscation and destruction of all gambling slot machines.

Pat Brown petitioned the Nineteenth Judicial District Court for injunctive relief to prevent the destruction of the gambling slot machine, and gain instead, its return. The issue was submitted on written stipulation of facts and legal memoranda. The trial court ruled in favor of petitioner ordering the return of the machine. The State of Louisiana took suspensive appeal to the Louisiana First Circuit Court of Appeal. That court affirmed the decision of the trial court and further held LSA-R.S. 15:31 to be unconstitutional.

Appeal was taken to the Louisiana Supreme Court which reversed the decision of the First Circuit, and sustained the constitutionality of LSA-R.S. 15:31.

REASONS FOR DENYING THE WRITS

Despite petitioner's efforts to inflate this controversy into an issue arising under the United States Constitution, this case involves a rather simple question: Can the State of Louisiana, in the reasonable exercise of its police power, declare that *gambling slot machines* are contraband and order their summary confiscation and destruction?

LSA-R.S. 15:31 reads in pertinent part as follows:

> "A. All law enforcement officers of municipal police forces, sheriff's departments and the division of state police, are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all *gambling devices* or machines used for gambling that come to their attention.

> B. As used in this Section, the term 'gambling device' means: (1) *any slot machine;* or (2) any machine, mechanical or electronic device of any sort whatsoever with a cash automatic payoff device; or (3) a pinball or other ball machine, mechanical or electronic device equipped with a mechanism to release the number of free games or replays and a mechanism to record the free games or replays so released." (Emphasis added.)

In order to understand the present posture of the statute, its history is important. The Louisiana Constitution of 1921 provided at Article 19, Section 8, "Gambling is a vice and the Legislature shall pass laws to suppress it."

Pursuant thereto, the Louisiana Legislature of 1928 enacted Act 231, Section 1, which read as follows:

> "All officers of the State of Louisiana are hereby authorized and empowered and it is made mandatory and compulsory on their part, to confiscate and immediately destroy all gambling devices known as slot machines that may come to their attention or that they may find in operation."

In 1949, the Louisiana Supreme Court had occasion to consider the propriety of the provision in light of constitutional guarantees. In *State of Louisiana v. Ricks*, 41 So.2d 232 (La., 1949) the Louisiana Supreme Court sustained the statute against constitutional attack, liberally citing and quoting from decisions of the United States Supreme Court.

In 1966, LSA-R.S. 15:31 was amended by Act 311 to read as follows:

"31. Confiscation and destruction of gambling devices; exceptions

A. All officers of the State of Louisiana are hereby authorized and empowered and it is made mandatory and compulsory on their part to confiscate and immediately destroy all gambling devices or machines used for gambling that may come to their attention *and that they may find in operation.* The ownership of a federal gambling stamp for the machine or device shall be absolute proof of its use for purposes of gambling, except as set forth in Subsection B of this Section, and neither the State of Louisiana nor any subdivision, agency, agent, or enforcement officer shall be liable civilly or criminally for the destruction of any gambling device or gambling machine for which a federal gambling stamp has been issued. (Emphasis added.)

B. This Section shall not apply to any games, machines, or other devices, where there is no cash automatic payout and where there is an element of skill involved in the playing, including specifically coin-operated bowling games, shuffle alleys, pinball games, mechanical baseball games, electronic ray guns, mechanical guns, digger type machines, iron claws, and all similar types of coin-operated amusement games, as licensed under Subsections A,B,C, and E of R.S. 47:375."

Thereafter, the Louisiana First Circuit Court of Appeal had occasion to construe the amended version in the case of *Gascon v. State of Louisiana thru Department of Public Safety* 263 So.2d 81, (La. App. 1st Cir., 1972) and held that in order for the police to exercise

their confiscatory power, the gambling slot machine must be in *actual operation.*

Less than one month after this decision was rendered, LSA-R.S. 15:31 was amended to its present form omitting the phrase, ". . . and that they may find in operation." However, the issue of actual use was not finally resolved until the Louisiana Supreme Court decided the case of *State of Louisiana v. Madere* 352 So.2d 366 (La., 1977), wherein the court held that it was the intent of the Legislature, through the state's police power, to declare gambling slot machines to be contraband, insusceptible of ownership, and provide for their summary confiscation and destruction *irrespective of actual use for gambling.*

In petitioner's efforts to enlarge this case into one of federal constitutional proportions, much is made of the fact that petitioner's machine was not in actual use for gambling. The point is constitutionally irrelevant.

Contraband narcotics need not be in actual use in order to fall within the state's power to confiscate and destroy that which is dangerous to society. Such a requirement would be ludicrous. The danger lies not only in the actual use, but the potential for actual use as well, and while petitioner's gambling slot machine admittedly was not in actual use, it is a completely operable gambling slot machine, but for a missing lock on its coin box. In other words, for the mere cost of a few dollars to install a simple lock on the coin box, the device could be used for gambling.

At the trial court, the issue was submitted upon written stipulation of fact, an *accurate* copy of which can be found at Appendix A. Therein, both parties stipulated to the fact that the machine in question was and is *operable*, and no amount of rhetorical slight of hand on the part of petitioner ought to deceive this court. Let it be clear! We are *not* dealing with a device that "could not be used for gambling" as petitioner repeatedly asserts in application. At issue is a fully operable gambling slot machine that is merely missing the lock from the coin box. In fact, if the device were placed against a wall, which is the customary means of implementation, a user would not know that the coin box was unlocked. Thus, let us not be deceived. At issue is a *gambling slot machine* of precisely the type long proscribed in Louisiana as dangerous contraband insusceptible of ownership and which cannot be subject to the property rights protected by both the United States and Louisiana Constitutions.

Petitioner asserts at page 5 that the state stipulated that the device was "the personal property" of Pat Brown. That simply is not correct. At paragraph 4 of the *Written Stipulation of Facts* (Appendix A), the state merely stipulated that the slot machine was in the possession of petitioner Pat S. Brown.

Petitioner relies heavily upon the legal distinction between contraband per se and derivative contraband, the former being those things insusceptible of lawful use, while the latter includes those things susceptible of lawful use but which are put to unlawful purposes. For example, motor vehicles are things, the fundamental

purpose of which is lawful. However, if a motor vehicle is used by or with the consent of the owner to transport illegal narcotics, it becomes *derivative contraband*. On the other hand, the illegal narcotics being transported is *contraband per se*. Notice and hearing are required by due process with regard to the motor vehicle. However none is required with regard to the narcotics. The legal distinction lies in the fact that the fundamental purpose of motor vehicles is lawful, while the illegal narcotics are things the fundamental purpose of which is unlawful. Notice that the distinction does *not* lie in whether a thing is *susceptible of lawful use*. A bag of heroin can be lawfully used as a paperweight, but the potential for use as a paperweight does not offset the dangers associated with its *fundamental purpose*. Therefore, the appropriate point of view for this court is toward the *fundamental purpose of a gambling slot machine*. Clearly, it was manufactured as a *gambling device*. Clearly, its principle purpose is for use as a *gambling device*. Gambling is unlawful. Therefore the gambling slot machine here at issue is *not* derivative contraband, but contraband per se and is within the state's police power to summarily seize and destroy.

LSA-R.S. 15:31 is thrust upon this court by petitioner as unconstitutionally vague and overbroad, because it "authorizes the seizure and destruction of any machine operable by dropping a coin into a slot such as an ordinary gum machine, or coke machine." Once again, petitioner must resort to rhetorical excess to make a tenuous point.

The statute mandates that police officers confiscate and destroy *gambling devices*. At subsection B, gambling devices are defined, in pertinent part, as any slot machine. Petitioner conveniently extracts the term *slot machine* from its logical and coherent context, and asserts that non-gambling vending machines come within the provisions of the statute.

Nota bene that it is gambling devices that are proscribed by the statute. *Gambling* is risking something of value in order to realize a profit. Therefore, a *gambling device* is, fundamentally, a device whereby one can risk something of value in order to realize a profit.

While some perhaps would contend that there is a certain risk associated with using vending machines, due to mechanical malfunction, they are fundamentally devices of commerce designed and intended to facilitate commercial transactions - *quid pro quo*. One deposits coinage with the expectation and legal right to acquire a product in exchange.

For a *slot machine* to come within the meaning of the statute, it must be a *gambling device*, that is a device whose fundamental purpose and intent is to facilitate the risk of something of value in order to realize a profit. Despite the strained rationale' of petitioner, vending machines simply do not fit the mold; and apparently petitioner is the only one who has mistaken the Legislature's meaning in the fifty years since Act 231 of 1928 went into effect. Not once has a coke or gum machine been mistaken for a "one-armed bandit," and been seized and destroyed to the detriment of a citizen's property

rights. And even in the unimaginable event that such a mistake were made, the citizen's rights could be vindicated by money damages, which is the traditional remedy as pointed out by this court in *Lawton v. Steele* 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385.

CONCLUSION

The manifest legislative intent of LSA-R.S. 15:31 is to proscribe *gambling devices*. The statute defines *gambling device* in pertinent part, as any *slot machine*, and mandates summary confiscation and destruction. Obviously, then, *slot machines* susceptible of use as a *gambling device* are contraband per se. They are *not* derivative contraband given the legislative history and the holding of the Louisiana Supreme Court in *State of Louisiana v. Madere*, supra. In the case at hand, State Police officers acting pursuant to a search warrant seized an admittedly operable *gambling slot machine* of the precise type proscribed by the statute.

Further, the enactment is well within the police power of the state, to declare things which are detrimental to the health, safety and welfare as contraband. Such power, of course is bounded by reasonableness, and for at least fifty years in Louisiana such provisions have not been found wanting. Our highest court, relying upon precedent from this Honorable Court, has consistently sustained such provisions.

Therefore, based upon the foregoing, it is re-

spectfully submitted that the application by petitioner for writ of certiorari be denied.

Respectfully submitted,

JAMES C. DIXON
Attorney of Record
State of Louisiana, through Department of Public Safety
P.O. Box 66614
Baton Rouge, LA 70896
(504) 925-6103

CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Brief in Opposition to Application for a Writ of Certiorari to the Supreme Court of Louisiana have been served on Carolyn Pratt Perry, counsel of record for Pat S. Brown, petitioner, of the law firm of Franklin, Moore, and Walsh, 501 Louisiana Avenue, P.O. Box 3958, Baton Rouge, Louisiana, 70821, by depositing said copies in the U.S. mail, postage prepaid, this ____ day of May, 1981.

JAMES C. DIXON
Attorney of Record

APPENDIX "A"

NUMBER 226,405—DIVISION "G"
19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

PAT S. BROWN, JR.

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY, DIVISION OF THE LOUISIANA STATE POLICE DEPARTMENT

WRITTEN STIPULATION OF FACTS

1.

The State of Louisiana, through the Department of Public Safety, Division of State Police, their officers and agents agree and stipulate that during the pendency of this litigation, whether in the trial or appellate courts, that certain slot machine belonging to Pat S. Brown, Jr. and made the subject of this litigation will not be altered, tampered with or destroyed.

2.

The slot machine in question was an antique slot machine.

3.

The slot machine in question was a one-cent machine, operable only by insertion of a penny, and not operable by insertion of other coins of greater monetary value.

4.

The slot machine in question was in the possession of Pat S. Brown, Jr.

5.

The slot machine in question is and was at the time of seizure operable.

6.

The slot machine in question was not used for gambling purposes.

NOTE: Photographs of machine in question attached.

7.

No criminal charges for gambling have been brought against Pat S. Brown, Jr. arising out of his possession of the antique slot machine in question.

8.

The slot machine coin box where deposited coins are stored does not have a lock, and coins once deposited can be reclaimed by anyone so depositing a penny in the coin slot.

9.

At the time of the seizure the slot machine was located on a bathroom countertop located in the women's restroom of the Pat S. Brown, Jr. Claim Service at 10466 Airline Highway.

10.

The restroom wherein the machine was stored is not generally open to the public.

11.

The search warrant attached hereto is a search warrant under which the State asserted its authority to seize the machine in question.

FRANKLIN, MOORE &
WALSH
501 Louisiana Avenue
Post Office Box 3958
Baton Rouge, Louisiana 70821
Telephone: (504) 383-2608

By: _____
Daniel J. Dziuba
Attorney for Plaintiff

STATE OF LOUISIANA
DEPARTMENT OF
PUBLIC SAFETY
DIVISION OF STATE
POLICE

By: _____
Howard Elliott
Attorney for Defendant